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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR UNION RESPONDENT

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QUESTION PRESENTED

Whether, for the limited purpose of assuring compliance with applicable laws, rules, and regulations, a dispute over a federal agency's determination to contract out work performed by its employees may be submitted to arbitration under the statutory grievance procedure established by 5 U.S.C. § 7121.

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BRIEF FOR UNION RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (FLRA) (Pet. App. 40a-48a) is reported at 10 FLRA 3. The FLRA's order denying petitioner's motion for reconsideration is reported at 11 FLRA 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 24, 1984. A timely petition for rehearing was denied on December 3, 1984 (Pet. App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a

writ of certiorari to and including May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case requires consideration of the following statutory provisions, the relevant portions of which are set forth in the appendix to this brief: 5 U.S.C. §§ 7103(a)(9) and (14), 7106, 7117(a), 7121(a)-(c), and 7122(a).

STATEMENT

Overview of Labor-Management Relations in the Federal Service

1. Labor-management relations in the federal service is governed by Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII (the Statute) appears at 5 U.S.C. § 7101 *et seq.* The Statute establishes the Federal Labor Relations Authority (FLRA or Authority) to administer the Statute. Among other responsibilities, the FLRA decides representation questions, unfair labor practice allegations, exceptions to arbitration awards, and negotiability disputes—the latter involving questions concerning the legality of a contract proposal. 5 U.S.C. §§ 7105, 7117. Respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (AFGE or union) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4). AFGE represents employees of petitioner Equal Employment Opportunity Commission (EEOC or employer), an agency-employer within the meaning of 5 U.S.C. § 7103(a)(3).

2. While establishing a collective bargaining system with enforcement procedures similar in many respects to those prescribed for the private sector under the National Labor Relations Act (NLRA), 29 U.S.C. § 141 *et seq.*, the Statute departs from the private sector model in some respects significant to the instant case.

Unlike the private sector, where grievance arbitration is created solely by contract, the Statute establishes a mandatory grievance arbitration procedure for resolving a wide range of employee and labor union complaints, 5 U.S.C. § 7121, excluding some categories of disputes not encompassing the contracting out questions at issue in this case. 5 U.S.C. § 7121(c). "Grievance" is defined as any complaint by any employee or labor organization relating to "the employment of any employee" or any complaint by an employee, labor organization, or employer concerning the effect, interpretation, or alleged breach of a collective bargaining agreement; or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). "Conditions of employment" are broadly defined to include matters, "whether established by rule, regulation, or otherwise, affecting working conditions," excluding those matters relating to proscribed political activities, the classification of positions, or to the extent they are specifically provided for by federal statute. 5 U.S.C. § 7103(a)(14). The statutory grievance procedure requires arbitration as a final step, 5 U.S.C. § 7121(b)(C), and provides for review by the FLRA of any exceptions to arbitral awards. 5 U.S.C. § 7122. The FLRA is required to assure that no award is deficient "because it is contrary to any law, rule, or regulation" or on other grounds similar to those applied by federal courts [under 29 U.S.C. § 185] in private sector labor-management relations." 5 U.S.C. § 7122(a).

Furthermore, unlike the NLRA, the Statute establishes a *limited* statutory reservation for some management prerogatives relating to the employer's mission, budget, organization, and internal security, 5 U.S.C. § 7106(a)(1), as well as its authority "in accordance with law" to hire, lay off, appoint, or discipline employees, assign work, and make contracting out determinations. 5 U.S.C. § 7106(a)(2). In the private sector, "management rights" are largely created by contract. In addition to the limitation imposed by section 7106(a)(2) ("in accordance with

law") management's authority is expressly qualified by the obligation to negotiate over procedures and appropriate arrangements relating to any management prerogative. 5 U.S.C. § 7106(b)(2) and (3).

In situations where an employer alleges that a proposal is contrary to law, the dispute, unlike private sector practice, may be submitted to the FLRA under an appeal procedure separate from the unfair labor practice route. 5 U.S.C. § 7117. This route was utilized in this case, following the employer's assertion that the union's proposal was contrary to law by virtue of its purported conflict with management's reserved authority to make contracting out determinations (Pet. App. 40a).

Overview of Contracting Out Process

Commercial and industrial activities performed by federal employees that do not involve inherently governmental functions may be performed by contract with private companies if shown to be cost effective and otherwise meeting prescribed requirements. These requirements are variously established by statute and regulation and restrict individual agencies in making contracting out determinations.

OMB Circular A-76 is a comprehensive document establishing executive branch policies and procedures to be used in determining whether commercial or industrial goods and services should be obtained by contract with private companies or provided in-house, using government personnel and facilities.[1] In large part, it establishes

[1] For brevity, all references will be to the last comprehensive revision of the Circular in 1983, 48 Fed. Reg. 37110 *et seq.* While the Circular that was in effect when the dispute over the union's proposal first arose was issued in 1979, 44 Fed. Reg. 20556, the proposal does not prevent the employer from applying the Circular and other laws pertaining to contracting out as they have changed, or would change, from time to time. *See* FLRA's decision (Pet. App. 41a). Furthermore, the differences between the two versions of the Circular are not material to the disposition of the issue presented on review.

vigorous cost competition between the private and public sectors, mandating that the services will be provided by the means which is less expensive. Circular A-76, ¶ 5a, 48 Fed. Reg. 37114. *See also* Comptroller General, *Factors Influencing DOD Decisions to Convert Activities from In-House to Contractor Performance, Report to the Chairmen, Senate and House Committees on Armed Services* (1981) 4.

The Federal Acquisition Regulations, which establish general procurement rules for federal agencies,[2] including those pertaining to the acquisition of commercial or industrial products, summarize the requirements of the Circular, highlighting the rules that, "[i]n making cost comparisons, agencies shall—

> (1) Prepare an estimate of the cost of Government performance based on the same work statement and level of performance as apply to offerors; and
>
> (2) Compare the total cost of Government performance to the total cost of contracting with the potentially successful offeror;
>
> (b) Provide that solicitations . . . issued to obtain offers for comparison purposes shall state that they will not result in a contract if Government performance is determined to be more advantageous . . . ;
>
> (c) Provide that each cost comparison shall be reviewed by an activity independent of the activity which prepared the cost analysis to ensure conformance with the instructions in the [Cost Comparison] Handbook[.] . . . .

48 CFR § 7.302 (1984).

First established as a formal document in 1955, the Circular has been amended several times, as noted in petitioner's brief, at 5, n. 3. The Circular and its accompanying supplement, which includes a comprehensive cost comparison handbook, "set[] forth procedures for determining whether commercial activities should be performed

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[2] 48 CFR § 1.000 (1984).

under contract . . . or in-house." Circular A-76, ¶ 1, 48 Fed. Reg. 37114. By its terms, each agency head is required to implement the Circular and its supplement. *Id.*, ¶ 9(d), 48 Fed. Reg. 37115. The Circular establishes "cost competition" between contract and in-house performance over most agency functions and mandates that "comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work." *Id.*, ¶ 5a, 48 Fed. Reg. 37114. It further provides that "the Government shall not start or carry on any activity . . . if the product or service can be produced economically from a commercial source." *Id.*, ¶ 5c, 48 Fed. Reg. 37114.

In addition to the limitations that the Circular imposes upon agency discretion, agencies are restricted by their own regulations [3] pertaining to contracting out and statutory restrictions which Congress has enacted in this area. For example, in 1974, Congress established a requirement that the Department of Defense provide it with a full justification for any conversion from one form of manpower (military, civilian, or private contract) to another.

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[3] As required by Circular A-76, individual agencies are required to implement the Circular's provisions through their own instructions. Circular A-76, ¶ 9, 48 Fed. Reg. 37115. *See e.g.*, 50 Fed. Reg. 37527 (Department of Defense final rule on commercial activities program); DOD 4100.33-H (DOD In-House vs. Contract Commercial and Industrial Activities Cost Comparison Handbook (Apr. 1980) (intended to establish consistency, assure that all substantive factors are considered and achieve desirable level of uniformity—mandatory for use by all DOD activities); Army Regulation 5-20 (eff. Feb. 1, 1985) (implements Circular A-76 and DOD directives and provides standards for determining coverage of activities, establishes procedures for review of activities, and provides instructions for studies to compare the cost of contract versus in-house performance); OPNAVINST 4860.6C (Naval Commercial Activities (CA) Program Manual) (eff. Feb. 5, 1982); Air Force Regulation 26-1 (Manpower Policies and Procedures, Comparative Cost Analysis) (eff. Oct. 1981); Department of Transportation Order 4400.2C (Performance of Commercial Activities) (eff. Feb. 1984); and Department of Transportation Order, FAA 2510.12B (Performance of Commercial Activities—OMB Circular A-76) (eff. June 1984).

Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, § 502, 88 Stat. 399 (1974).[4] In 1980, Congress passed legislation prohibiting contracting out by the Department of Defense, if intended to circumvent any personnel ceiling, and requiring the submission of reports to Congress on all proposals to contract out work, including certification that a cost comparison has demonstrated that the performance of the work by contract would result in a cost savings to the government when compared with in-house performance organized in the most efficient and cost effective manner. Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, § 502, 94 Stat. 1077, 1086 (1980).

Moreover, in recent years Congress has sought to prohibit contracting out in entire agencies and occupational areas. The Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 307, 98 Stat. 2492, 2514 (1984) prohibited contracting out of core logistics services (personnel, equipment, and facilities) under "Circular A-76 or any successor administrative regulation or policy." The Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982) prohibited contracting out of any firefighting or security guard functions at any military installation except for the renewal of existing contracts.[5] Further, the Veterans' Compensation, Education, and Employment Amendments Act, 1982, Pub. L. No. 97-306, § 409, 96 Stat. 1429, 1446 (1982), 38 U.S.C. § 5010 note, establishes detailed restrictions upon contracting out by the Veterans Administration. In addition to imposing an out-

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[4] See also Department of Defense Authorization Act, 1980, Pub.L. No. 96-107, § 501(e), 93 Stat. 803, 809 (1979) (restrictions on manpower management affecting some activities subject to contracting out).

[5] This Act, at § 305, 96 Stat. 724, also imposed a broad moratorium upon any contracting out studies involving functions performed by the Department's civilian personnel. This operated to effectively curtail contracting out by the Department of Defense during the period covered by the Act.

right ban on any contracts involved with direct patient care, it imposes requirements beyond those prescribed by Circular A-76, among them that health care would be enhanced by contracting out, and that the costs of performance over the first five years of a contract would exceed 15 percent savings over in-house performance. *Id.*

Facts and Proceedings Below

During negotiations with AFGE, the EEOC refused to bargain over the union's proposals relating to the employer's responsibilities with regard to contracting out work performed by bargaining unit employees (Pet. App. 40a-47a). Specifically, the employer refused to bargain over the following proposals:

Union Proposal I

> Section I—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Union Proposal II

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its intention to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

Union Proposal III

> Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

(Pet. App. 40a, 43a, 45a, 46a).

AFGE, pursuant to 5 U.S.C. § 7117, appealed the employer's refusal to bargain over these proposals to the FLRA. The FLRA declared the first two proposals negotiable, ordering the employer to bargain with the union over them; the FLRA declared the third proposal nonnegotiable as outside the statutory duty to bargain.[6]

With regard to the first proposal, which is the focus of the employer's petition, the FLRA found that it was not inconsistent with management's right to "make determinations with respect to contracting out" under section 7106(a)(2) (Pet. App. 40a). The FLRA held that a contractual agreement whereby the employer agreed to comply with OMB Circular A-76 and other applicable laws and regulations relating to contracting out would not impose any substantive limitations upon management's right to make contracting out determinations apart from those already existing (Pet. App. 41a).

The FLRA also rejected the employer's contention that its right to make contracting out determinations would be impeded because the proposal would subject its contracting out actions to resolution by the parties' grievance procedure (Pet. App. 42a). In this regard, the FLRA recognized that questions concerning the employer's contracting out actions, even in the absence of the contract provision proposed by the union, were grievable unless the parties, through negotiations, agreed to exclude such grievances, or a particular grievance was inconsistent with law (Pet. App. 42a-43a).

The FLRA also rejected the employer's argument that a union's complaints over a contracting out decision would be solely reviewable under the appeal procedure established by Circular A-76 (Pet. App. 41a-42a), whereby the employer reviews its own actions. The FLRA held

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[6] The FLRA reasoned that this proposal created absolute employment security for employees affected by a decision to contract out unit work, thereby directly interfering with the employer's right under section 7106(a)(2)(A) to layoff employees (Pet. App. 46a-47a).

that even if there was a conflict between the proposal and the Circular, the latter cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a). [Emphasis in original].

With regard to the second proposal, requiring the employer to provide the union with advance notice and opportunity to respond to the employer's reasons for considering contracting out of work performed by unit employees, the FLRA rejected the employer's argument that the proposal would impermissibly interfere with its right to make contracting out determinations (Pet. App. 44a). In so doing, it also found that there was no inconsistency between the proposal and federal procurement regulations calling for "economy, efficiency and effectiveness in the procurement of property and services" (Pet. App. 45a).

The EEOC sought reconsideration of the FLRA's decision (*see* Pet. App. 6a, n.9), requesting, in part, that the FLRA "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." 11 FLRA 720. The FLRA denied the request, finding that the employer was asking the FLRA, in effect, to make arbitrability determinations in the absence of a specific factual context. *Id.*, 721. The FLRA continued by advising the employer that it could avail itself of the statutory procedure under 5 U.S.C. § 7121 for resolving arbitrability questions.[7]

The employer sought judicial review under 5 U.S.C. § 7123(a) of the FLRA's decision insofar as it required negotiations over the proposal whereby the employer would agree to conform its contracting out actions to

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[7] Under the scheme crafted by Congress, questions of arbitrability are to be resolved, in the first instance, by arbitrators. 5 U.S.C. § 7121(a)(1). The arbitrator's ruling on the arbitrability question is reviewable by the FLRA upon exceptions filed by a party. 5 U.S.C. § 7122(a). *See* Celmer, *Substantive Arbitrability*, 81 Federal Labor Relations Reporter No. 17 (Oct. 1981).

Circular A-76 and other applicable law and regulation (Pet. App. 1a, 6a). The FLRA filed a cross-petition for enforcement (Pet. App. 6a).

A divided panel of the court of appeals enforced the FLRA's order (Pet. App. 1a-37a), holding that the proposal would not interfere with the employer's prerogative to make contracting out determinations. In reaching this conclusion, the court of appeals agreed with the FLRA's finding, in effect, that the language of the proposal merely echoed the statutory requirement that contracting out determinations, like other reserved management prerogatives affecting conditions of employment, are grievable to the extent questions exist as to their conformance with law, rule, or regulation (Pet. App. 9a). In this regard, the court observed that the proposal imposed no substantive criteria upon management's reserved authority to make contracting out determinations. (Pet. App. 9a). The court continued by observing that both section 7106(a)(2)(B), which preserves management's authority to make contracting out determinations, and section 7103(a)(9) which, along with section 7121, define the scope and coverage of grievance procedures in the federal sector, evidence that even so-called management rights are "qualified" to the extent that an employer's actions must conform to law (Pet. App. 11a-15a).

The court also held, in agreement with the FLRA, that there was no inconsistency between the proposal and the provision in Circular A-76 providing for internal agency review of complaints over a contracting out determination (Pet. App. 16a). The court reasoned that the Circular did not operate to "create" a right of appeal; the right to arbitral review was created by Congress in enacting the statutory grievance procedure (Pet. App. 16a). Furthermore, the court added, that even if there was an actual or apparent inconsistency, Congress did not intend to allow agencies, by regulation, to restrict coverage of the grievance procedure (Pet. App. 16a).

The dissenting panel member would have denied enforcement of the FLRA's order, stating that the union's

proposal would interfere with the employer's prerogative to make contracting out determinations by imposing substantive criteria upon management's decisionmaking authority (Pet. App. 24a). In support of this conclusion, the dissent read the second clause of section 7106(a) ("nothing in this chapter shall affect the authority of any management official . . .") as limiting the coverage of the statutory grievance procedure (Pet. App. 28a-29a). The dissent also found that even if a contracting out decision results in the loss of jobs, it does not affect "conditions of employment" within the meaning of section 7106(b), which the dissent views as much less inclusive than its analog in the private sector (Pet. App. 29a-33a).

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the union's contract proposal that the EEOC "comply with OMB Circular A-76, and other laws and regulations concerning contracting out" merely echoed the statutory requirement that the parties' grievance procedure encompass any complaint by an employee or the union alleging that the employer's actions were contrary to law, rule, or regulation (Pet. App. 9a, 15a).

In taking its contrary position, the employer ignores the plain language used by Congress (and the purposes underlying its enactment of the Statute) in establishing a broad grievance procedure in the federal sector. Unique to the federal sector, Congress defined a "grievance" to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). The Statute also provides that the grievance procedure "shall be the exclusive procedure [] for resolving such claims." 5 U.S.C. § 7121(a)(1). Although Congress excluded from the statutory grievance procedure certain disputes, *see* 5 U.S.C. §§ 7103(a)(9), (a)(14), and 7121(c), none of the exclusions encompass contracting out disputes.

The employer largely ignores the broad statutorily prescribed scope of the grievance procedure to instead focus upon the union's motives in seeking to include the proposal within the parties' agreement and to assert that section 7106, the management rights provision in the Statute, operates to bar arbitral review of contracting out disputes.

With regard to the union's proposal, the employer ignores the practicalities of collective bargaining in the federal sector. Although, in contrast to the private sector, there is a vast expanse of federal law setting the terms and conditions of employment for federal employees, it is common practice for such agreements to include extensive recitation of rights established by statute or otherwise if for no other reason than the agreement provides a handy reference guide and serves to underscore the parties' intention to comply, in the best of good faith, with regard to some particularly significant legal obligations. Thus, there is no merit to the employer's contention that the union's efforts to include the proposal in the parties' agreement evidences an attempt to obtain something not provided by the Statute's own terms.

Similarly, the employer is incorrect when it suggests that section 7106 operates to bar arbitral review of contracting out of disputes. Not only does the hierarchical scheme of section 7106 subordinate reserved managerial authority to the duty to bargain over procedures involving its exercise and the protection of employees adversely affected, but its terms substantively qualify the exercise of contracting out authority and other employer prerogatives "in accordance with law." 5 U.S.C. § 7106(a)(2).

The EEOC's core argument that "nothing in [the Statute] shall affect management's authority to make contracting out determinations," by logical extension, would bar grievances and arbitral review over the exercise of managerial authority, among others, to hire, assign, lay off, retain, discipline and appoint employees, and

to assign work. In drafting section 7106, Congress treated identically the exercise of these rights, 5 U.S.C. § 7106(a)(2)(A)-(D), qualifying the exercise of each by the proviso that it be done "in accordance with law." 5 U.S.C. § 7106(a)(2). The employer's position would not only fail to square with the language of section 7106, but would also render superfluous sections 7103(a)(9) and 7121(c) to the extent that they exclude certain matters from the grievance procedure.

The reading which the court of appeals gave to the statutory grievance procedure and its relationship to section 7106(a)(2) is fully supported by the legislative history of the Statute. Indeed, the legislative record shows that Congress was aware of the danger that some employers might seize upon section 7106 as a means to defeat their obligations under the Statute. To prevent this occurrence, Congress left unmistakeable direction that the FLRA and the courts should reject any such attempt.

As noted earlier, contracting out by federal agencies is governed by rules and regulations and, to a lesser extent, for some agencies by statute. While the focus of this case has been upon Circular A-76, the Federal Acquisition Regulations, 48 CFR § 1.000 *et seq.*, and the regulations of individual agencies also govern the employers' actions. Although Circular A-76 is not a formal regulation, it is promulgated in a manner which parallels notice and comment rulemaking under the Administrative Procedure Act. It creates specific, binding requirements upon federal employers, leaving individual agencies little discretion. The Comptroller General routinely applies its provisions in resolving challenges to agency procurement actions. Moreover, the Statute clearly contemplates that arbitral review and other aspects of collective bargaining extend to issuances such as the Circular, which govern a federal employer's actions. While the employer argues, albeit erroneously for the reasons just discussed, that the Circular is not a rule for purposes of arbitral review,

it argues that it is a rule or regulation under 5 U.S.C. § 7117, which operates, in some cases, to bar negotiation over matters covered by governmentwide rules or regulations. We contend that the Circular is a "rule" for all purposes within the meaning of the Statute and that it is not barred by section 7117. Contrary to the EEOC, the proposal is not barred because it involves the same subject matter as the Circular or conflicts with its "exclusive appeals procedure." The employer's position, if correct, would completely nullify the duty to bargain in the federal sector, and, as noted by the court of appeals, would allow an agency to undo by regulation what Congress has expressly mandated by statute, *i.e.*, to provide for arbitral review over an agency's application of law, rule, or regulation.

Arbitral review is fully consistent with the dual nature it serves in the federal sector to enforce both contractual rights and "to police compliance with controlling laws, rules, and regulations." Elkouri and Elkouri, *How Arbitration Works* 52-53. This reflects the reality of federal employment where there exists "an immense body of law which governs nearly every aspect of the employment relationship." Frazier, *FLRA Policy and Practice in Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). Thus, "[w]hile there may be a common law of the shop . . . in the private sector, there is a statutory law of the workplace in the federal sector." *Id.*

It is only because the issue in this case arose in the context of a negotiability dispute that the employer can raise the spectre of an arbitrator substituting his or her judgment in matters reserved to the employer's discretion. In the unlikely event that an arbitrator might overstep the bounds of his or her authority, review of the award by the FLRA is available under 5 U.S.C. § 7122. Whatever additional assurances, the employer needs to supplement its reserved authority, in light of arbitral review, can be obtained at the bargaining table.

Finally, arbitral review, by assuring compliance with applicable law, rule, or regulation, can only promote an "effective and efficient" government, a goal sought to be achieved by Congress in enacting the Statute. 5 U.S.C. § 7101.

ARGUMENT

Disputes over an agency's contracting out determinations are subject to arbitral review for the limited purpose of assuring compliance with applicable laws, rules, or regulations under the statutory grievance procedure established by section 7121 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*

A. Introduction.

The EEOC's argument can be reduced to the following proposition: the contractual provision at issue in this case is not negotiable because it would subject the employer's decision to contract out to the arbitration process. As we demonstrate below, however, the Statute clearly requires submission of such disputes to arbitral review for the *limited purpose* of assuring compliance with law, rule, and regulation. The union does not claim that its contract proposal would permit any substantive negotiations over such issues as whether, when, or how management can decide to contract out for services, or that the Statute's grievance arbitration mechanism would permit an arbitrator to decide such issues. Similarly, the union does not claim that it can engage in negotiations concerning the criteria which the employer must apply in making such determinations, or that an arbitrator can impose any criteria not already prescribed by law. Instead, the union claims the right to include in the parties' collective bargaining agreement a clear restatement of its rights under 5 U.S.C. §§ 7103(a)(9) and 7121 to arbitral review as a means to assure that the employer has followed the government's own laws, rules, and regulations governing the contracting out process.

This issue can be better understood against the backdrop of how the labor relations system in the federal

sector operates. Accordingly, we begin by briefly describing that system and how it differs from the more familiar private sector system.

One hallmark of the labor relations system in the private sector is the sharp dichotomy the law draws between contractual and statutory rights. In the main, the terms and conditions of employment for private sector employees are created by agreement of the parties and are enforced through a grievance arbitration procedure designed to "effectuate the intent of the parties." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). Federal law regulates the substance of private sector employment relationships only interstitially, and, to the extent such federal rights are created by statute, an independent federal (judicial) remedy exists to enforce those rights. In the private sector, even where a contractual right duplicates a statutory right—as might be true, for example, where a contract proscribes racial discrimination—the two rights remain distinct and are enforced through different forums; indeed, a decision with respect to a contractual claim is not even preclusive of a parallel statutory claim.

As more fully explored in part E of our argument, at 41-48 herein, there is no such sharp dichotomy between contractual and statutory rights in the federal sector. To begin with, for federal employees, a large number of employment rights are statutory in nature. As a member of the Federal Labor Relations Authority has observed, there is an "immense body of law which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government." Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). Thus, "[w]hile there may be a common law of the shop in many industries in the private sector, there is a statutory law of the workplace in the federal sector." *Id.*

Moreover, unlike their private sector counterparts who enforce only contractual rights, federal sector arbitrators enforce rights created by law as well; indeed, a principal function of the federal arbitrator is to "police compliance with controlling laws, rules, and regulations by federal agency employers." Elkouri and Elkouri, *How Arbitration Works* (4th ed. 1985) 52-53. This remains true without regard to whether or not that right is incorporated into a collective agreement (and thereby made into a contractual obligation as well); the Statute expressly provides that, unless the parties to a collective agreement otherwise agree, the grievance procedure shall adjudicate "*any* claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Indeed, the Statute provides that the grievance procedure "shall be the exclusive procedure[]" for resolving such claims. 5 U.S.C. § 7121(a)(1).

Given the vast expanse of federal law setting the terms and conditions of employment for federal employees—and given that, by operation of law, the statutory rights of federal employees are enforceable through the grievance procedure—in theory all that need be included in a bargaining agreement in the federal sector are the particulars of a grievance procedure and provisions establishing those terms and conditions of employment that are not fixed by federal law. In practice, however, federal sector agreements are not so limited. It is common practice for such agreements to include extensive recitations of statutory rights. Although such statements have no independent legal effect—the rights exist and would be enforceable through the grievance procedure even if not mentioned in the collective agreement—federal agencies and unions often find it useful to delineate some or all of the statutory rights in the agreement, if only to provide a handy reference guide for managers and employees alike and to serve as a token of the parties' joint agreement that the employer will comply with certain

particularly important legal obligations in the best of good faith.

In the union's view, that was precisely the point of its proposal for a contractual provision committing the agency to "comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." The union proceeded on the premise that the Circular—like the "other applicable laws and regulations" referenced in the proposal—is part of the "statutory law of the workplace in the federal sector" which is binding on the EEOC, and enforceable through the grievance procedure, whether or not mentioned in the collective agreement. The union, nonetheless, thought it useful to include the reference in the parties' agreement. When the EEOC challenged the negotiability of the proposal, it put in question both the union's understanding of the Statute and the Circular's legal status, precipitating the instant controversy.

B. The statutory grievance procedure extends to alleged violations of laws, rules, or regulations governing contracting out, notwithstanding the reservation of managerial authority in section 7106(a)(2).

1. In taking issue with the finding that some disputes relating to contracting out are subject to arbitration under the parties' statutorily prescribed grievance procedure, the employer ignores the plain language used by Congress (and the purposes underlying its enactment of the Statute) in establishing a broad grievance procedure in the federal sector. Unique to the federal sector, Congress defines a "grievance" as follows:

> [A]ny complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—

> (i) the effect or interpretation of a claim of breach of a collective bargaining agreement; or
>
> (ii) *any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation* affecting conditions of employment[.] [Emphasis added.]

5 U.S.C. § 7103(a)(9). The Statute provides that the reach of "grievance" is limited only by the matters specifically excluded from the definition of "conditions of employment," 5 U.S.C. § 7103(a)(14), and those matters excluded by 5 U.S.C. § 7121. The term "conditions of employment," in turn, is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise affecting working conditions" except for: "policies, practices, and matters" concerning prohibited political activities, classification of positions, and those specifically provided for by federal statute. 5 U.S.C. § 7103(a)(14). Section 7121 excludes only the following matters from the statutory grievance procedure: alleged violations of proscriptions on political activity; disputes relating to retirement, life insurance, and health insurance questions; suspension or removal of employees on grounds of national security; examination for, or certification or appointment to, positions; or reduction in rank. 5 U.S.C. § 7121(c). Thus, none of the matters expressly excluded from the grievance mechanism prescribed for the federal sector relate to the issue presented by this case.

Upon the strength of the statutory language, the court of appeals necessarily concluded that "[a]n allegation that the EEOC failed to comply with the OMB Circular, or with any other law or rule governing contracting out, plainly falls within [the Statute's] expansive definition" (Pet. App. 12a-13a). In this regard, the court suggests that if Congress had intended to exclude disputes over the contracting out process from the statutory grievance procedure, it logically would have utilized section 7121

(c), wherein it chose to list the categories excluded from the procedure (Pet. App. 12a). Except for those subject areas, Congress provided for arbitral review over all categories of disputes arising in the federal workplace. It is by specific statutory language, 5 U.S.C. §§ 7103(a), 7121, that Congress sought to establish the parameters of the grievance mechanism, not indirectly through language in section 7106(a).

As the court of appeals recognized, the union's proposal would merely echo the statutory requirement that, absent contrary agreement by the parties, the grievance mechanism would encompass any complaint by an employee or the union that an employer had contravened a law, rule, or regulation (Pet. App. 9a, 15a). The result reached by the court and the FLRA is a natural construction of the statutory provisions; it stands in marked contrast to the EEOC's strained construction which, as discussed below, would dismiss, as meaningless, the limiting language "in accordance with law" from section 7106(a)(2). The EEOC seeks to restrict the issue in this case to disputes solely arising in connection with Circular A-76, demonstrating a misapprehension of the Circular and ignoring the other statutory and regulatory restrictions upon management authority in the contracting out area.[8] Then, by trying to create the misimpression that Congress drafted the management rights provision with the intention of curtailing the submission of contracting out disputes to arbitral review, the EEOC asks the court, in effect, to rewrite the Statute to exclude its provision for limited review of contracting out determinations and to incorporate its own policy regarding the wisdom of arbitral review over such disputes.

2. The employer largely ignores the *statutorily* prescribed scope of the grievance procedure to focus, instead, on the management rights provision, 5 U.S.C. § 7106. That provision, the EEOC argues, prevents submission of

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[8] See discussion at 33-41 herein.

contracting out disputes to the grievance arbitration procedure. This argument must fall in the face of the clear language of the Statute.

The employer's position not only denies any meaning to the qualification that management is to make contracting out determinations "in accordance with law," 5 U.S.C. § 7106(a)(2), it also ignores the other equally clear limitations imposed by section 7106. In writing section 7106, Congress established a hierarchical scheme in limiting negotiations over reserved management authority. First, it assured that the management rights provision not be used to bar negotiations over any matters relating to procedures for exercising any reserved authority, 5 U.S.C. § 7106(b)(2), or "appropriate arrangements" for employees adversely affected by the exercise of such authority. 5 U.S.C. § 7106(b)(3). Section 7106 predicates any exercise of management's reserved authority upon negotiations with the union over the way in which the authority will be exercised and the protection of employees who may be adversely affected. Accordingly, any contracting out disputes which involve matters of "procedure" or "appropriate arrangements" are arbitrable.

While all reserved authority, therefore, is subordinated to the bargaining obligation over procedure and appropriate arrangements, *cf. Cornelius v. Nutt*, 105 S.Ct. 2882, 2885 (1985), Congress differentiated from among management's prerogatives in protecting against their otherwise possible diminishment through collective bargaining. Congress imposed no substantive qualification within section 7106 upon the reservation of an agency's authority over its "mission, budget, organization, number of employees, and internal security practices." 5 U.S.C. § 7106(a)(1). With regard to all other enumerated aspects of reserved managerial authority, including contracting out, the employer's prerogatives are substantively qualified by the proviso that they be exercised "in accordance with law." 5 U.S.C. § 7106(a)(2). Although the employer stops short of stating in its brief that the section 7106(a)(2) proviso was not intended by Congress to

limit management's authority,[9] its position nevertheless would deny that language any effect insofar as contracting out determinations are concerned.

The EEOC's argument that contracting out determinations are not subject to arbitral review, by logical extension, would totally exclude from that process challenges to the exercise of any authority listed in section 7106(a)(2)(A)-(D). This is the effect of its core argument that "nothing in this chapter shall affect . . . management's authority to make contracting out determinations" because the language upon which it relies also reserves management's authority "in accordance with law":

> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take any other disciplinary action; [or]
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.
>
> (C) with respect to filling positions, to make selections for appointments from—
>
> > (i) among properly ranked and certified candidates for promotion;
> >
> > (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

5 U.S.C. § 7106(a)(2). In seeking to preserve management authority in the contracting out area, Congress, by placing it in section 7106(a)(2) rather than section 7106(a)(1), clearly chose to do so in the same manner as it did for managerial rights, among others, to hire, assign, lay off, retain, discipline, and appoint employees, and to assign work. 5 U.S.C. § 7106(a)(2).

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[9] But note that in its petition for certiorari, the employer suggests that the proviso "in accordance with applicable law" was not intended as a substantive limitation upon management's reserved authority (Pet. 15-16).

In secton 7121, Congress expressly provides that parties may avail themselves of the grievance arbitration procedure for disputes involving prohibited personnel practices, employment discrimination, adverse actions, and unacceptable performance, 5 U.S.C. § 7121(d) and (e), *i.e.*, the whole range of personnel actions from discharges or demotions based upon poor performance or misconduct to discrimination issues. *See* 5 U.S.C. §§ 2301, 2302, 4303, 7512. Even the employer would find it difficult to deny that those matters provide the grist for the mill of arbitration. Yet, the "nothing shall affect" language in section 7106(a), as read by the employer, would supersede the provisions of section 7121 and deny arbitral review over disputes relating to these matters.

Similarly, the language of section 7121(c), which excludes categories of disputes from the grievance procedure, would be rendered superfluous under the EEOC's analysis. For example, under its argument *any* grievance concerning an "appointment" would be barred from the grievance procedure by operation of § 7106(a)(2)(C), which reserves management's prerogative "to make selections for appointments." Surely, Congress would not have included language in section 7121(c) specifically excluding from the grievance procedure "any grievance . . . concerning any . . . appointment," if, as the employer suggests, section 7106(a)(2) was intended itself to exclude from the grievance mechanism any disputes relating to the employer's appointment authority. Thus, it is clear that the mere listing of a managerial prerogative in section 7106 does not operate to remove disputes relating to its exercise from the statutory grievance procedure. Nonetheless, the employer, to the extent it might seek to avoid the logical consequence of its position, would have the court, contrary to norms of statutory construction, somehow pare contracting out from the other prerogatives listed in section 7106(a)(2), and treat it differently than other managerial rights. The language of section 7106 simply does not permit such a torturous construction; instead it mandates that contracting out, as part of section

7106(a)(2)(B), is to be treated the same as the other prerogatives listed in subsections (A)-(D)—prerogatives which are routinely submitted to arbitration or the Merit Systems Protection Board for a determination whether an employer has acted in accordance with law. *See* 5 U.S.C. §§ 7121(e), 7701(c)(2)(C). As the FLRA and the court of appeals recognized, effect can be given to the "in accordance with law proviso" of section 7106 and the broad grievance procedure, as established by section 7103 and 7121, only by treating complaints over contracting out determinations the same as complaints regarding discipline, layoffs, and work assignments. Logically extended, the employer's position would deny any effect to the "in accordance with law" proviso in section 7106(a)(2) not only in the contracting out area but also, contrary to uniform practice and policy, with regard to a whole host of other employment actions, where the rights of federal employees also are established by a myriad of laws, rules, and regulations. *Cf. Cornelius v. Nutt*, 105 S.Ct. 2882, 2883 (1985).

Allowing arbitral review to assure employer compliance with law, rule, or regulation, both gives effect to the Statute's provisions establishing the grievance mechanism and preserves management's ultimate authority to act consistent with law, excepting from arbitral review only those matters excluded from its coverage by section 7103 and 7121(c). This interpretation of the Statute, rather than infringing upon management's authority under section 7106(a), only assures the employer's compliance with the law applicable to its contracting out determinations. A contrary reading would only permit the government to violate with impunity its own contracting out rules, a result which clearly is not in the interest of the employer, federal employees, or the public.

3. The employer contends (Pet. Br. 45) that submission of contracting out disputes is barred by 5 U.S.C. § 7117(a)(1), which excepts from the bargaining obligation certain matters covered by government rule or reg-

ulation. Since the Circular concerns contracting out, the employer argues, no proposal relating to contracting out can be negotiated. The argument is two pronged, neither of which has merit.

First, the EEOC asserts that the union's proposal is "inconsistent" with the Circular because it conflicts with the latter's exclusive appeals procedure (Pet. Br. 44). However, as the FLRA and court of appeals held, even if there is some inconsistency with a provision in the Circular, that provision cannot override the statutory requirement that a grievance procedure be available to resolve complaints over "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." *See* 5 U.S.C. § 7103(a)(9).[10]

As the court of appeals correctly observed:

> First, the proposal is not inconsistent with the Circular's limiting language. The proposal does not "create" any new right of appeal. Rather, . . . the right to file grievances regarding contracting-out decisions is created by the [Statute].
>
> Second, and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations. There is no indication . . . of a congressional intent to allow agencies to limit by regulation the statutorily defined

[10] The EEOC's reliance upon decisions relating to the grievability of issues involving national guard technicians (Pet. Br. 45-46) is misplaced. In the cases cited, it was a statutory conflict, not an alleged inconsistency between the statutory grievance procedure and applicable regulation, which was controlling. While there, the courts viewed the specific statute involved, the National Guard Technicians Act, 32 U.S.C. § 709, as more indicative of Congressional intent with regard to appeals by technicians than the more general right to grieve under the Statute, the cases provide no support for the contention that a rule or regulation can operate to restrict the right to grieve.

grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co. v. NLRB*, 338 U.S. 355, 363 (1949).

The second prong of the employer's argument is that the union's proposal is barred because it involves the same subject matter as covered by the Circular. Here again, the employer seeks to either treat contracting out differently from other matters relating to federal employment *or* to eliminate collective bargaining altogether over subjects that historically and without any prior question have been negotiated in the federal sector. Governmentwide regulations, most typically those issued by the Office of Personal Management, cover virtually the entire spectrum of the employment relationship in the federal sector. *See generally* Code of Federal Regulations, Title 5, and the *Federal Personnel Manual*. If the employer's argument is correct, then virtually nothing affecting the federal workforce can be negotiated because any provision would involve a matter which already is the "subject" of a governmentwide rule or regulation. As this would render the duty to bargaining provisions in the Statute a nullity, the employer's argument must fail. Neither section 7106(a)(2) nor section 7117(a)(1) contains any language which would allow for the special treatment which the employer's position demands.

4. The employer attempts to draw upon experience in federal sector labor-management relations, prior to enactment of the Statute, to support its argument that Congress did not intend the submission of contracting out disputes to arbitration. Its attempt must fail.

Arbitration was not always favored under the management-oriented regime that existed prior to enactment of the Statute.[11] In contrast to the system established

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[11] *See* Federal Labor Relations Council, *Report and Recommendations of the Federal Labor Relations Council on the Amendment of*

under the Statute, substantial restrictions existed upon arbitration's use and coverage.[12] For a period of time, it was advisory in nature, serving only as an adjunct to an agency's final determination on complaints by unions and employees.[13] Even when it became binding upon the parties, its scope did not extend to more significant actions by the employer, those covered by so-called "statutory appeals." [14] Adverse actions and other matters for which a "statutory appeal" existed were excluded from the parties' grievance procedure; otherwise, however, the parties were permitted to negotiate over its scope.[15]

Unlike the Statute, a broad scope grievance procedure, was not mandated. However, there was an evolution towards the broad scope procedure. While, at first, grievances were permitted only over questions relating to the interpretation of the parties' collective bargaining agreement, beginning in 1975, grievances were extended to the interpretation and application of agency policies and regulations.[16] Yet, even before then it was common for ar-

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Executive Order 11491, as amended (1975), [*1975 Report*], *reprinted in* House Committee on Post Office and Civil Service, 96 Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (hereinafter *"Legislative History"*).

[12] *See* President's Task Force, *A Policy for Employee Management Cooperation in the Federal Service, Report of the President's Task Force on Employee-Management Relations in the Federal Service* (1961), *reprinted in Legislative History* at 1177, 1205-06; Interagency Study Committee on Federal Labor Relations, *Report and Recommendations, Labor-Management Relations in the Federal Service* (1969), [*1969 Report*], *reprinted in Legislative History* at 1218, 1239-41.

[13] *1969 Report, reprinted in Legislative History* at 1241; *1975 Report, reprinted in Legislative History* at 1315.

[14] *1975 Report, reprinted in Legislative History* at 1314-19.

[15] *Id.*

[16] *Id.*, 1314-1316.

bitrators to rely upon statute and regulation in resolving disputes.[17] Similarly, the employer's position is not advanced by the want of grievances over contracting out disputes under the earlier regime. As noted, the more significant actions by the employer were excluded from its coverage. More importantly, however, it was not until after the Statute's enactment that the Circular, in 1979, was revised so as to provide a standard against which employer actions could be measured. Absent such a standard, grievances would have been futile.

C. The Statute's legislative history underscores the intention of Congress to require arbitral review to assure that management's reserved rights are exercised "in accordance with law."

1. As AFGE has shown, the employer, through strained and convoluted attempts at statutory construction, has sought to use the management rights provision to defeat its obligation to submit to arbitration any disputes involving contracting out determinations and, by logical extension, to submit to arbitration any disputes involving the exercise of any management prerogative listed in section 7106(a)(2). However, Congress was well aware of this danger, specifically warning that management might seek to impose that construction upon section 7106. To prevent this occurrence, Congress left unmistakable direction in the legislative record that the FLRA and the courts should reject any such attempt.

First, Congress made clear that section 7106, rather than defeating the collective bargaining obligation, was to be given a narrow reading. As stated by Representative Udall, in the sectional analysis accompanying the substitute bill which he sponsored and became law:[18] "[T]he "management rights" section . . . is to be treated

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[17] *Id.*, 1318-19.

[18] *See NTEU v. FLRA*, 691 F.2d 553, 559, n. 59 (D.C. Cir. 1982).

narrowly as an exception to the general obligation to bargain over conditions of employment." [19] This intention was repeated by Representatives Ford and Clay, also proponents of the Statute.[20] As stated by Representative Clay: "[T]he management rights [provision] is to be construed as a narrow exception to the general obligation to bargain in good faith. . . . If the [FLRA and the courts are] faithful to th[is], the ultimate exercise of the specified managerial responsibility, the only subject exempted from the bargaining obligation, will be protected and the general obligation to bargain over conditions of employment will be unimpaired." [21]

Congress was aware that management, in seeking to undercut the reach of its collective bargaining obligation, might attempt to draw upon labor relations experience in the federal sector prior to the Statute's enactment, notwithstanding as shown, several differences between the two systems. Here, too, it made clear its intention that such efforts must fail. As stated by Representative Ford: "Too often the [Federal Labor Relations] Council interpreted the management rights [provision] so broadly as to stifle an attempt by both management and employees to address common recognized problems . . . ;" adding,

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[19] 124 Cong. Rec. 29183 (1978), *reprinted in Legislative History* at 924.

[20] *NTEU v. FLRA*, 691 F.2d at 560.

[21] 124 Cong. Rec. 29187 (1978), *reprinted in Legislative History* at 931-933. Congress recognized that the management rights clause, if not faithfully applied in the narrow sense intended, could undermine the very purpose of establishing a system of collective bargaining in the federal service. In this regard, Representative Ford states: "The concept of negotiability is and must be a dynamic and growing one. If not, [f]ederal sector labor relations must fail because the energies of management and labor will be diverted from consideration of important labor relations problems to the litigation of the scope of exceptions to the general bargaining obligation." 124 Cong. Rec. 29198 (1978), *reprinted in Legislative History* at 956.

"A principal goal in revising the management rights [provision] is to change the current situation and, wherever possible, encourage both parties to work out their differences. . . ." He continued: "[T]he listed management rights [are] to be narrowly construed exceptions to the general obligation to bargain . . . and . . . section 7106 [is to] be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal." [22]

The legislative record also clearly establishes the relationship which Congress intended between the management rights provision and the statutory grievance procedure. In this connection, Congressman Ford explained: "Section 7103(a)(9) includes within the definition of grievance, any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. Under this definition as adopted by the conferees, so long as a rule or regulation affects conditions of employment, infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation . . . is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right." [23] Similarly, as noted by the court of appeals (Pet. App. 14a, n. 20), Congress explained the interplay between the statutory grievance procedure and management's exercise of its reserved authority under section 7106(a)(2) as follows:

> *The new language preserves management's right to make final decisions in the [reserved] areas, in accordance with applicable laws.* . . . [M]anagement

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[22] 124 Cong. Rec. 29198-29199 (1978), *reprinted in Legislative History* at 953-956.

[23] 124 Cong. Rec. 38717, *reprinted in Legislative History* at 998.

> has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement. [Emphasis added.] [24]

The statement appears in the sectional analysis accompanying the Udall substitute,[25] which also states that all the management rights listed in section 7106(a) are "reserved in accordance with law." [26] The legislative history also suggests that Congress did not intend the language of section 7106 to restrict the scope of the statutory grievance procedure. Thus, the House Committee's report states: "The effect of this section is to place limits on the number of subjects about which agency management may bargain with a labor organization." H.R. Report 1403, 95th Cong., 2d Sess. 43; *reprinted in Legislative History* at 689. Even the Collins Amendment, which was offered as an alternative to the Udall substitute and which more closely paralleled the Executive Order than the latter,[27] contained a narrower grievance mechanism, but one which was characterized as "permit[ting] grievance arbitration to cover *any matter within the authority of an agency to decide*" excluding specific items such as political activities, classification, and insurance matters. [Emphasis added.] [28] Furthermore, while the legislative

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[24] 124 Cong. Rec. 29183 (1978), *reprinted in Legislative History* at 924.

[25] *Id.*

[26] *Ibid.*

[27] 124 Cong. Reg. 29174, *reprinted in Legislative History* at 906.

[28] *Id.*

history sheds little light specifically on the contracting out language in section 7106(a)(2), the absence of any evidence to suggest that Congress intended that an agency's contracting out authority be treated differently than the exercise of any other prerogative listed in section 7106(a)(2), indicates the intention of Congress not to exclude contracting out disputes from the grievance process.[29] In sum, the legislative record supports the plain language of sections 7103(a)(9) and 7121 that complaints arising in the workplace and affecting unit employees are covered by the statutory grievance procedure unless excluded by operation of those sections. In any event, it is clear that section 7106(a)(2) was not intended by Congress to exclude from the grievance procedure disputes that relate to contracting out or the other subjects there enumerated.

D. Circular A-76 is a "law, rule, or regulation" within the meaning of the Statute.

The union's proposal simply incorporates the statutory requirement that the union may challenge the employer's contracting out actions through the grievance mechanism to assure compliance with applicable laws, rules, and regulations. It imposes no new standards upon agencies, only holding them to what is already required by law, as recognized by the FLRA and the court of appeals. (Pet. App. 9a, 41a).

As already discussed, see 4-8 herein, in the contracting out area, some legal requirements are established by

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[29] At the time the statutory scheme was crafted, it was well-recognized that contracting out was a routine subject of negotiations between labor and management in the private sector, which often was the subject of arbitration. *See* Fairweather, *Practice and Procedure in Labor Arbitration* (2d Ed. 1983) 469-93; Elkouri and Elkouri; *How Arbitration Works* (3d Ed. 1973) 501-11; *see also Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 211-13 (1964).

statute for certain agencies. More generally, the requirements of Circular A-76 have been incorporated, in effect, into the Federal Acquisition Regulations, which govern procurement actions by the entire federal government. Individual agencies, in turn, have incorporated the terms of the Circular or established other rules relating to contracting out in their own regulations. Nevertheless, given the employer's virtually exclusive focus upon Circular A-76, it is necessary to dispel two notions: first, that agencies are generally unrestrained in making contracting out determinations (Pet. Br. 12-13, 24, 25); and, second, that Circular A-76 is not a rule affecting conditions of employment, which, therefore, lies outside the scope of the statutory grievance procedure (Pet. Br. 23-29, 37-38).

To counter the employer's claims, a detailed examination of the Circular is required. After explaining the restrictions which its terms impose upon individual agencies, we will demonstrate that the Circular is a "rule" within the meaning of the Statute and, that, therefore, disputes concerning its interpretation or application are subject to the statutory grievance procedure.

1. a. The terms of the Circular and its supplement clearly disprove the contention that agencies have considerable leeway in conducting cost comparisons or in otherwise contracting for services covered by it. The opposite is true. Much of the Circular contains specific methodology for quantifying, measuring, or otherwise accounting for the employer's costs in performing a function, which, correctly applied, will yield only one result and will determine whether the function is to be performed by contract or in-house.

The Supplement, including a comprehensive handbook for conducting cost comparisons,[30] applies to all execu-

[30] Copies of the supplement were submitted by the employer to the court and served on the parties in connection with its petition.

tive agencies and "sets forth procedures to be used for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." ¶¶ 1, 7a, 48 Fed. Reg. 37114. It provides that if private performance of a function is permissible, a comparison of the cost of contracting and the cost of in-house performance shall be conducted, as specifically prescribed by the Circular and its Supplement, to determine who will do the work. *Id.*, ¶ 5a. As a general rule, government performance is authorized only if a cost comparison demonstrates that the government is operating, or can operate, the activity at a lower estimated cost than by contract. *Id.*, ¶ 8d, 48 Fed. Reg. 37115.

The Cost Comparison Handbook establishes the standard cost factors to be applied in conducting the cost comparison and requires that all significant costs be included in the comparison, and that the in-house estimate be based upon "the most efficient and cost-effective in-house operation needed to accomplish the requirements in the performance work statement." *Id.*, I-11, 12. Agencies are required to provide for review of cost comparisons by an organizationally independent component of the agency to assure "the currency, reasonableness, accuracy and completeness of the cost comparison." *Id.*, I-13, 14.

The Handbook continues with specific, detailed instructions regarding the development of cost comparisons. *Id.*, II-1, based upon the principle that "The Handbook must be used . . . to ensure . . . fair, reasonable, and consistent cost studies." *Id.*, IV-1. To assure that fair and equitable comparisons are achieved, the Handbook provides line-by-line instructions for completing a series of worksheets (personnel, material and supply costs, depreciation, insurance, overhead, and so on), *id.*, Part IV, Chapters 3, 4, culminating in completion of a cost comparison form, the "bottom-line" of which dictates whether the activity will be performed by contract or in-house by fed-

eral employees. *Id.*, IV-45, 46. The Handbook requires "document[ation] to provide a record of information to support each line of the cost study." *Id.*, IV-6.

While the Handbook allows for some judgments to be made by agencies (*e.g.*, tools for use in determining in-house staffing estimates, *id.*, IV-7), the comparison is largely the ministerial application of prescribed cost factors and computational procedures. The Handbook even restricts agencies in areas where they are permitted some discretion (*e.g.*, basis for computing personnel costs once workload is established in the mode deemed most efficient, *see id.*, IV-9). The Handbook prescribes a specific method, cost figures, or procedure for the following: inflation, IV-7; conversion for productive work hours, IV-8; completion of personnel costs, fringe benefits (including standard factors for retirement, FICA, insurance, and workers compensation), IV-10; pricing material from other government agencies, IV-16, 17; depreciation, IV-19 to 21; rent, IV-23; maintenance and repair, IV-23; utilities, IV-23; insurance, IV-23 to 27; certain overhead costs, IV-27 to 32; tax adjustments, IV-35, 40; contract administration, IV-36; labor related conversion costs, IV-38. In sum, Circular A-76 establishes specific, detailed and binding rules upon federal agencies that restrict their authority to make contracting out determinations, leaving them very limited discretion.

b. Although the Circular purports to disclaim any construction of its terms "as creating any substantive or procedural basis for anyone to challenge any [action] or inaction," 48 Fed. Reg. 37114, ¶ 7.c.(8), the Comptroller General (CG) has routinely applied its provisions to assure that the rights of bidders or offerors are protected.[31] Indeed, the decisions by the Comptroller General demon-

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[31] The Comptroller General has denied unions any standing to participate in bid protests involving questions relating to Circular A-76. *See Federal Employees Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244 (1985).

strate the ability of a third party to apply the provisions of the Circular so as to require strict agency conformance where so mandated, while preserving an agency's discretion where the Circular so allows.[32] That the Comptroller General has routinely applied the provisions of the Circular so as to assure that agencies engage in fair procurement practices belies the employer's position that its provisions are merely advisory or incapable of review without intrusion into areas reserved for an agency's sole discretion.[33]

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[32] *See e.g., Pan Am World Services, Inc.*, B-215829, June 24, 1985, 85-1 CPD ¶ 712 (CG will review protests over contracting out decisions to determine whether agency adhered to applicable procedures and groundrules; upheld protest involving agency's failure to follow the handbook on cost comparisons); *Mercury Consolidated, Inc.*, 63 Comp. Gen. 411, 413 (1984) (CG will not uphold a protest where Circular leaves matter to agency's judgment); *Holmes & Narver Services, Inc. and Morrison-Knudson Company, Inc.*, B-212191, Nov. 17, 1983, 83-2 CPD ¶ 585 (agency failed to fully cost direct labor as required by Circular; agency failed to comply with OMB modification to Circular concerning allocation of a specific element of overhead costs; agency's appeal board correctly found error in wage computations, noting in connection with bidder's allegation of error that CG would not question some elements of contracting process unless agency shown to have acted unreasonably); *Contract Services Company, Inc.*, B-208180.2, Sept. 16, 1983, 83-2 CPD ¶ 331 (in protest challenging application of Circular and related agency regulations, CG noted that "we will not second-guess, the [agency's] perception of its own staffing requirements" in estimating its direct labor costs for in-house performance, noting that the agency's own regulation allowed the use of particular methodology at issue); and *Contract Service Company, Inc.*, B-210796, Aug. 29, 1983, 83-2 CPD ¶ 268 (CG would not second-guess agency where Circular merely required an estimate of retained pay costs; however, CG applied Circular's provisions where specific to determine validity of agency's calculation of costs and actual computations).

[33] The employer, while completely silent in its brief about the Comptroller General's important role in assuring compliance with the Circular, seeks to bolster its position that the Circular does not restrain actions of individual agencies by drawing upon the largely unsuccessful efforts of unions to obtain judicial review of particular

c. The Statute defines both the statutory grievance procedure and the duty to bargain, in part, by reference

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contracting out determinations (Pet. Br. 25-28). In rebuttal, a few points need to be made.

First, while the employer suggests otherwise, the federal courts have not shut the door completely on challenges to contracting out actions by federal agencies. *See Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496, *cert. denied*, 439 U.S. 927 (1978) (in reaching merits, court denied union's challenge to service contracts as contrary to civil service laws and NASA's enabling statute); *International Graphics, Division of Moore Business Forms, Inc. v. United States*, 5 Cl.Ct. 100, 105-107 (1984) (recognizes requirements of Circular as binding upon contracting agencies as a prescribed condition of the procurement process); *Accord, International Graphics, Division of Moore Business Forms, Inc. v. United States*, 4 Cl.Ct. 186, 197-199 (1983). *See also International Association of Firefighters, Local F-100 v. U.S. Department of the Navy, Naval Education and Training Center, Newport, Rhode Island*, 536 F.Supp. 1254 (D.R.I. 1982); and *Advo-System, Inc. v. Kreps*, 471 F.Supp. 116 (D.D.C. 1979).

Second, while judicial review, until recently, has been largely unsympathetic to litigants seeking to use Circular A-76 as a basis upon which to state a cause of action, *those efforts were based upon the 1967 version of the Circular, which was much less specific than subsequent versions and lacked a detailed methodology for conducting cost comparisons. International Graphics, Division of Moore Business Forms, Inc. v. United States*, 4 Cl.Ct. 186, 198, n. 14 (1983). The earlier Circular contained a provision stating that "[n]o specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances." Circular A-76, 7c(3) (Revised 1967), *quoted* in *Local 2855, AFGE v. Brown*, 602 F.2d 574, 581 (3rd Cir. 1979). Now there exist not only specific rules established by the Circular and its Supplement but, as noted, ample precedent by the Comptroller General, applying these provisions, to serve as guidance to courts or other decisionmakers. *Cf. International Graphics*, 4 Cl.Ct. at 198-199. Furthermore, to the extent that courts have denied unions standing to attack agency actions in the contracting out area, or disposed of suits on similar grounds, the adverse precedent is not material to the instant case, given the union's standing in the arbitral process and the FLRA's review procedures under 5 U.S.C. § 7122.

to rules and regulations affecting the employment condition. "Grievance" is defined to include complaints over any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9).[34] The duty to bargain specifically contemplates bargaining over matters (though with some restrictions), which are also the subject of a "rule or regulation." 5 U.S.C. § 7117(a) and (b); *see* 5 U.S.C. § 7116(a)(7).[35]

On review, the employer does not take issue with the relationship between the Circular and its effect upon the EEOC's bargaining obligation *vis a vis* AFGE (See Pet. Br. 43-45). It, nonetheless, maintains that there exists an unarticulated distinction between the status of the Circular, on the one hand, under the statutory grievance mechanism, and, on the other hand, its status in the other circumstances provided for by the Statute.

The distinction is unsupportable. Congress is presumed to mean the same thing when it uses the same or similar language in different sections of a statute, absent strong indications otherwise—not present in this case. The weakness of the employer's position is underscored by the fact that it has not made this argument before the FLRA or earlier in the judicial review proceedings.[36]

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[34] *See* 5 U.S.C. § 7103(a)(14), which defines "conditions of employment," in part, in terms of "personnel policies, practices, and matters whether established by rule, regulation, or otherwise."

[35] The Statute also defines, in terms of "rule or regulation," "national consultation rights" (the right to be informed of any governmentwide rule or regulation affecting substantive conditions of employment proposed by any agency and the opportunity for a union to present its views and recommendations). *See* 5 U.S.C. § 7117(d)(1) and (2).

[36] 5 U.S.C. § 7123(c) provides: "No objection that has not been urged before the Authority . . . should be considered by the court unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

Contracting out disputes, as evidenced both by practice in the private sector, see note 29 herein, and the Circular's own terms, have a direct bearing on federal employees. Moreover, Circular A-76 and agency regulations based on its provisions expressly recognize the impact of contracting out upon employees and unions, providing them rights to information and participation in the contracting out process, *e.g.*, Air Force Regulation 26-1 § 5-8 (1981), as well as providing affected employees the right of first refusal for employment openings under the contract, Supp. I-13; priority consideration for available positions within the agency, *id.*, I-18; and the payment of training and relocation expenses relating to placement. *Id.*, I-19; *see also* Army Regulation 5-20 §§ 3-1 to 3-4 (1985).

As the various references in the Statute make clear, Congress intended an agency's obligation to extend beyond standards that are established by the formal rulemaking procedures under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* In so doing, it recognized that many policies, standards or practices of critical importance to federal employees have been and would continue to be established by less formal means. Thus, the reference in the Statute to "rule," as opposed to simply "regulation," and the use of the more general "law" to refer to the whole host of requirements prescribed by and for federal agencies. This express recognition that the conduct of federal employers is often set by means short of formal regulation was also reflected under the executive order program which governed labor relations in the federal sector prior to the Statute's enactment. *See* § 11 of E.O. 11491, as amended.[37] In addressing the relationship between the duty to bargain and "laws and regulations," the drafters of the Order specifi-

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[37] *Reprinted in Legislative History* at 1342, 1345.

cally included "policies set forth in the Federal Personnel Manual," [FPM], *id.*, even though it is not established as a formal regulation and, therefore, possessed a status as a "rule" in the same sense as the Circular. Moreover, there is no question but that the FPM is a rule within the meaning of the Statute. *E.g., U.S. Naval Air Station, Key West, Florida and AFGE, Local 1566,* 16 FLRA 1077 (1984). The Circular, unlike the FPM, however, is established in accordance with a process that parallels "notice and comment" rulemaking under the APA. *See* 48 Fed. Reg. 37110 (1983); *see also* petitioner's brief, 5, n.3. Thus, *a fortiori*, the Circular is a rule under the Statute. Moreover, any remaining doubt can be eliminated by consideration of the legislative history of the Statute. The Conference Report states:

> The conferees specifically intend, . . . that the term "rules or regulations" be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply. The right of labor organizations to enjoy national consultation rights will also include such official declarations of policy which are binding on officials or agencies.

H.R. Rep. No. 1717, 95th Cong., 2d Sess. 158-59.[38] Thus, the conclusion is inescapable that A-76 is a rule or law within the meaning of the Statute.

E. Arbitral review of contracting out determinations promotes the Statute's purposes and is fully consistent with its traditional function in labor-management relations.

1. The employer misconstrues the nature of grievance arbitration in the federal sector, ignoring its significant differences from the private sector. Particularly, the EEOC overlooks arbitration's important role in the fed-

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[38] *Reprinted in Legislative History* at 826-27.

eral sector in deciding, as a matter of course, disputes requiring the interpretation and application of statutes, rules, or regulations. As stated by a member of the FLRA:

> [T]he framework in which arbitration in the federal sector must operate . . . is the immense body of law, which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government. . . . [W]hile in the private sector, it is often enough to look to just the terms of the negotiated agreement to resolve a dispute, this is usually not the case in the federal sector. The arbitrator . . . must turn to those provisions of the statutes and regulations which govern the matter as well as the appropriate contract provisions. While there may be a common law of the shop in many industries in the private sector, *there is a statutory law of the workplace in the federal sector.* [Emphasis added.]

Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981). This distinction between grievance arbitration in the federal and private sectors has been acknowledged by the leading authorities in the field:

> The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function . . . in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike.
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> The dual role . . . probably was a principal factor in the congressional decision (1) to specify that each collective agreement in the federal sector "shall"

> provide a grievance procedure with arbitration, (2) to specify that all grievances "shall" be subject to the grievance and arbitration procedures except those specifically excluded by the collective agreement or statute, and (3) to define the term "grievance" very broadly.

Elkouri and Elkouri, *How Arbitration Works* (4th Ed. 1985) 52-53. As these commentators observe, arbitration in the federal sector has as a principal goal the application of law, rule, and regulation in resolving disputes. As such it is a goal to be fostered, not one which, as the employer suggests, to be avoided.

2. The employer's claims concerning the role and effect of arbitral review in the federal sector and its imagined consequences to the contracting out process are unfounded. (Pet. Br. 20-22). To the extent the employer suggests that arbitrators may be unable to decide questions of law, rule, or regulation, the authority is to the contrary. *See e.g., Elkouri and Elkouri*, Chapter 10; *Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983). More importantly, Congress has determined that arbitrators shall decide such questions. As this court has recognized, the statutory grievance procedure implements a major purpose of the Civil Service Reform Act—"to strengthen the position of federal unions and make the collective bargaining process a more effective instrument of the public interest." *Cornelius v. Nutt*, 105 S.Ct. 2882, 2885 (1985). Insofar as the employer suggests arbitrators are incapable of preserving managerial authority, one need only look to the widespread and contrary experience in the private sector. *See Elkouri and Elkouri*, Chapter 13.

Federal arbitrators presented with contracting out disputes have substantial precedent available to assist them, both in terms of applying Circular A-76 and the provi-

sions of the Statute.[39] If this is not enough assurance to management, the EEOC overlooks the opportunity it has to obtain at the bargaining table whatever additional assurances it deems necessary to protect its prerogatives. In enacting the Statute, Congress clearly acted on the premise that "[i]n collective bargaining, government managers are presumably competent to look out for the government interests." *Department of Defense v. FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981). Thus, for example, an employer, through negotiations, could seek such contractual standards and burdens of proof as it believes necessary or favorable to its position. Whatever concern management may have over delay and its attendant expense can also be remedied by insistence upon language requiring prompt submission of disputes to, and resolution by, the arbitrator, perhaps similar to the 30-day limit prescribed by Circular A-76 for agency review of protests to the contracting out process. In this regard, we note that it is not uncommon for federal sector agreements to provide for expedited arbitration proceedings.

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[39] This includes the uniform body of case law developed by the Comptroller General and the FLRA and the clear signposts of sections 7103, 7106, and 7121(c) available to assist arbitrators to avoid substituting their judgment on matters reserved to managerial determination. This is in contrast to private sector experience where management rights are based on the parties' particular contractual arrangement—oftentimes requiring difficult interpretative questions—or on even less precise formulations of matters deemed "inherent" to the employer's operations. The greater clarity and uniformity which is available to arbitrators in the federal sector should largely eliminate, in fact and perception, incursion by arbitrators into matters reserved for management. This consideration, no doubt, influenced the thinking of Congress in establishing a broad statutory grievance procedure. Furthermore, FLRA review remains available in those rare circumstances where arbitrators might exceed their authority. 5 U.S.C. § 7122.

If such provisions were reasonably necessary to protect the employer's interests, absent agreement with the union, there is no question that the provisions would be imposed upon the parties by the Federal Service Impasses Panel. *See* 5 U.S.C. § 7119(c)(5)(B).

3. Contrary to the employer's suggestion (Pet. 13a-15a), neither the court of appeals, nor the FLRA, has held that an arbitrator may substitute his or her judgment for some element of the contracting out process that is reserved to management's discretion. Rather, each held only that section 7106(a)(2)(B) does not foreclose arbitral review of the employer's actions to assure that they conform with applicable law. Arbitrators in the federal sector are constantly called upon to address questions of law. Moreover, it is not unusual even for arbitrators in the private sector to be called upon to review the propriety of management conduct in disputes requiring economic analysis or cost accounting, processes similar to what is required in reviewing an agency's compliance with Circular A-76. *See Elkouri and Elkouri* (4th Ed.) 483-92, 495-99, 536-37, 817-23, 847-48; *see also* Fairweather, *Practice and Procedure in Labor Arbitration* (2d Ed. 1983) 532-40. It is only because this case arose in the context of a negotiability dispute that the employer can raise the spectre of an arbitrator deciding matters that have been reserved for the government manager's discretion. In the unlikely event that an arbitrator would intrude upon the employer's discretionary authority, the arbitral decision is subject to review by the FLRA.

4. The FLRA is charged with the responsibility under 5 U.S.C. § 7122 to review exceptions to arbitral awards to assure that an award is not deficient as "contrary to any law, rule, or regulation; or . . . on other grounds similar to those applied by Federal courts in private sector labor-management relations." *See* 5 C.F.R. § 2425.1 *et seq.*

The problems which the employer envisions from arbitral review, if they arise, therefore, would be cognizable by the FLRA.[40] The FLRA would be able to review, for example, a contention that an arbitrator's decision interfered with a management right by substituting arbitral judgment for a matter left solely to management discretion; that an award conflicts with a provision in Circular A-76 or other applicable law, rule, or regulation; or that the parties' agreement either did not encompass any contracting out disputes or excepted a particular dispute from its coverage.[41] Moreover, the FLRA would be able to decide the questions in a specific factual context, after labor and management have been given a full opportunity

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[40] For a survey of the grounds upon which review from arbitral awards may be sought in the federal sector, *see* Frazier, *FLRA Policy and Practice on Arbitration Awards: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 9, 1981).

[41] The FLRA has shown itself effective in protecting management rights from encroachment by arbitrators. *E.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration*, 5 FLRA 763 (1981). While the FLRA, to date, has not ruled on any exceptions to arbitral awards involving contracting out issues, its decisions involving the legality of bargaining proposals concerning this subject show that the FLRA has been careful to protect reserved management authority, while, at the same time, providing unions and employees their rights under the Statute. *See AFGE, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 FLRA No. 118 (1985); *AFGE, Local 225 and Department of the Army, U.S. Army Armanent Research and Development Command, Dover, New Jersey*, 17 FLRA 417 (1985); *National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of Monterey, California*, 14 FLRA 761 (1984), *rev'd sub nom Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985); *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 FLRA 669 (1981); and *National Federation of Federal Employees and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA 574 (1981).

to develop evidence and argument and with the benefit of an arbitral decision on the issues.[42] Furthermore, the FLRA has determined that arbitral awards are not binding upon a federal employer until the FLRA rules upon any exceptions filed with it under section 7122. *U.S. Soldiers and Airmen's Home, Washington, D.C.*, 15 FLRA No. 26 (1984), *appeal pending sub nom. AFGE, Local 3090 v. FLRA*, No. 84-1439 (D.C. Cir.).[43] See 5 CFR § 2429.8.

5. The employer's claims that arbitral review will impede the government's efforts to save money by contracting out where cost-effective to do so are also unconvincing. Arbitral review can ensure that employers correctly cost out the relative expenses of performing work "in-house" and by contract. Where an employer, by ignoring requirements imposed by law, rule, or regulation, incorrectly determines that private enterprise can perform the function at less cost than by government personnel, arbitral review vindicates not only the rights of affected employees but also the public's interest in having work

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[42] Yet unresolved in the federal sector, as noted by the employer (Pet. Br. 22, n. 12), is the extent to which, if at all, FLRA decisions under section 7122 are subject to judicial review.

[43] Thus, there is no merit to the employer's contention (Pet. 10) that arbitral review will bar agencies from going ahead with plans to contract out work. If an employer elects to proceed with a decision to contract out work, despite a challenge to its legality or a finding by an arbitrator to that effect, it may do so. It is hardly unjust that an employer found to have acted unlawfully may have to remedy the situation, perhaps by rehiring employees who were adversely affected and making them whole for lost wages and other benefits. In this connection, it bears repeating that the FLRA's decision imposes no new requirements upon employers. Under the decision, as before, employers are required to comply with the standards imposed by Circular A-76 and other applicable laws, rules, and regulations.

performed in a manner which achieves the greatest savings.[44] Thus, arbitral review will serve not only to save the public monies in particular cases where an employer has violated law, rule, or regulation but will serve as a prophylatic means to assure that government managers do not abuse the public trust in obtaining services for the government. In so doing, arbitral review will promote an "effective and efficient government." [45]

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[44] For a description of the types of contracting out errors made by agencies in conducting cost comparisons and otherwise making contracting out determinations, *see* Comptroller General, *Factors Influencing DoD Decisions to Convert Activities from In-House to Contractor Performance, Report to the Chairmen, Senate and House Committees on Armed Services* (1981).

[45] The dynamics of contracting out will be little influenced by arbitration. As discussed, there is little discretion provided agency officials in deciding whether work is to be let by contract or not. Unless a function is governmental in nature (and as such required to be performed by government personnel), management must undertake a vigorous cost comparison which determines how the function will be performed. To the extent arbitral review may force the employer to be more precise in its computations, this only helps achieve the ultimate objective of the Circular. Yet even if this was somehow not a salutary result, arbitral review will not be the sole culprit. As the employer has pointed out in other contexts, agencies are themselves directed to provide an internal appeals procedure to ensure agency compliance with the Circular and other contracting out requirements; and the Comptroller General already fills a similar role. If the crux of the employer's complaint is third party review, such review now exists in the form of bid-protests to the Comptroller General. Thus, in sum, there is no basis to the employer's concerns over the hypothetical case where a "prudent manager [will] forego the letting of an otherwise desireable contract" (Pet. Br. 35) because his agency's actions will be subject to arbitral review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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5 U.S.C. § 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. § 7103(a)(14) provides:

"[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute[.]

5 U.S.C. § 7106 provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any author-

ity under this section by such management officials.

5 U.S.C. § 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. § 7121(a)-(c) provides:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

• • • •

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding

arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subsection III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * *

5 U.S.C. § 7122(a) provides:

Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.